REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 117 OF 2000

JOHN OUKO YOGI……PLAINTIFF

VERSUS

SPIN KNIT LIMITED…….DEFENDANT

JUDGMENT

The Appellant, John Ouko Yogi, filed suit against the Respondent, Spin Knit Ltd, seeking damages for the injuries that he alleged to have sustained while at his place of employment. In his Plaint, the Appellant averred that on the 3rd of May 1997 while he was working in the course of his employment with the Respondent operating a machine, the machine cut his fingers. The Appellant stated that the said accident was caused by the Respondent in that the Respondent failed to provide a safe and proper systems of work at the said premises. The Appellant further stated that the Respondent was negligent as it had failed to warn the Appellant of the danger involved in working with the said machines. The Appellant further stated that the Respondent was liable because it allowed the Appellant to work in a dangerous environment. The Appellant stated that as a result of the aforesaid failure by the Respondent to provide a safe working environment, the Respondent ought to be found liable in tort for the injuries that the Appellant sustained.

The Respondent when served with the Plaint, duly filed a defence. In the said defence the Respondent denied that it was negligent or failed in its duty of care to the Appellant. The Respondent further averred that the Appellant was, the author of his own misfortune in that he failed to take adequate precaution while handling the machine and further by trying to work on the machine without first switching off the machine. The Respondent further averred that the Appellant was negligent in that he put his hand in the machine while the machine was in motion.

After the close of the pleadings, the case was heard and determined by the then Learned Resident Magistrate, Miss E. Ominde. In her considered judgment, the learned magistrate stated that having visited the Respondents premises and heard the evidence of both the Appellant and the Respondent, she was of the considered view that the Appellant had not proved his case. The learned Resident Magistrate, in dismissing the Appellants case, ruled that the Appellant was the author of his own misfortune and further applied the doctrine of *volenti non fit injuria*. It is from this dismissal of the case by the learned Resident Magistrate that the Appellant has filed this Appeal. In his Memorandum of Appeal, the Appellant was aggrieved by the dismissal of his case by the learned Resident Magistrate on the grounds which may be summarised as follows:- That the trial Magistrate erred in failing to find that the Respondent had notprovided safe working systems for its workers; that the trial Magistrate erred in failing to find that the rules of liability under the **Factories Act (Cap 514)** are rules of strict liability and that the rolling machine was exposed and hence dangerously exposed; that the trial Court erred in failing to put into consideration the evidence which was adduced that the Respondent had not provided the Appellant with protective gear when removing the waste from the moving machine; that the trial Court erred in applying

the doctrine of *volenti non fit injuria* when the said doctrine was not applicable in the circumstances of the case and finally that the trial magistrate erred in dismissing the Appellant's case without evaluating the evidence or giving any reasons for dismissing the said case.

In his submissions before Court, Mr Odhiambo, learned counsel for the Appellant argued that the trial magistrate erred in failing to find the Respondent negligent and hence liable for the injuries sustained by the Appellant. The Appellant was aggrieved that the learned trial magistrate did not give any reasons when dismissing his case. Mr Odhiambo submitted that the Appellant had proved that his finger was cut by the machine when he was not wearing any protective gear. Mr Odhiambo further argued that negligence was proved by the Appellant on a balance of probabilities. The Appellant further argued that the Respondent did not adduce any evidence to controvert the evidence that wasadduced by the Appellant in establishing that he was injured due to the negligence of the Respondent. Learned counsel further submitted that the doctrine of *volenti-non fit injuria* was not applicable in the Appellant's case as the Respondent had not adduced any evidence of the safety mechanisms that it had installed to prevent the occurance of accidents such as the one the Appellant got injured.

Mr Odhiambo further submitted that once a worker is employed in a factory the liability of the Respondent is that of strict liability and not subject to any exception. He submitted that **Section 5 of the Factories Act** and the regulations made thereunder made it mandatory for the Respondent to provide a safe working environment for its workers. The Appellant further submitted that the Respondent had a common law duty to provide a safe working environment and the defence of a *volenti non fit injuria* was not available to the Respondent. Mr Odhiambo urged the Court to allow the Appeal and enter judgment for the Appellant and give an appropriate award in accordance with the submissions made by the Appellant. Mr Odhiambo referred the Court to various authorities which this Court considered in its judgment.

Mr Musangi, learned counsel for the Respondent opposed the Appeal. He submitted that the Appeal was fatally defective in that a certified copy of the decree was not extracted and made part of the record of Appeal. Mr Musangi took issue with the way leave to appeal out of time was granted. It was his submission that the Court did not have any basis whatsoever to grant leave to the Appellant to file Appeal out of time. The Respondent further submitted that the Appellant did not plead the issue of the breach statutory duty in his Plaint and therefore it was not open for the Appellant to raise the issue on Appeal. It was his submission that a party was bound by his pleadings and could not seek to introduce new issues on Appeal. The Respondent further submitted that the Appellant's case was based on negligence. Mr Musangi submitted that the trial Court visited the scene and observed the way the machine was operated. The Respondent submitted that the Appellant was injured while trying to remove waste from the roller machine with his bare hands while the roller machine was in motion. The Respondent submitted that the trial Court observed that there was direct instructions to the Appellant not to remove the waste while the roller machine was in motion; that the Appellant was provided with metal hooks to remove the waste from the rollers which the Appellant admitted he did not use; and finally that there was a written notice addressed to all workers that they should not attempt to clean the machine or remove waste whilst the said machine was in motion. The Respondent submitted that theAppellant would not have been injured if he had followed the aforesaid instructions.

Mr Musangi submitted that the Respondent adduced evidence to the effect that at no time were the workers allowed to use their bare hands to remove waste. Metal hooks were always provided for the purpose. The Respondent submitted that the legal basis on which negligence may be proved is that the employer has failed to provide safe systems of work. If an employee engages in act, contrary to instructions, that exposes him to injury then the doctrine of *volenti non fit injuria* must apply. The Respondent submitted that the learned trial magistrate was right to find that the Appellant was the author of his own misfortune and hence correctly arrived at the decision dismissing the Appellant's case. Mr Musangi further submitted that it was incumbent upon the Appellant to establish that indeed he was injured as a result of the Respondent's negligence. The Respondent submitted that the Appellant did not discharge this onus of proof. The Respondent urged this Court dismiss the Appeal with costs.

In reply, Mr Odhiambo submitted that the Appeal was competent. He argued that the issue of grant of

leave to appeal out of time cannot be challenged at this stage. It was his submission that the issue of statutory breach of duty was pleaded in paragraph 4 and 5 of the Plaint. Mr Odhiambo submitted that negligence was proved as the Appellant was injured in the course of doing the work that he was instructed to do. The Appellant submitted that the doctrine of volenti non fit injuria was not applicable in an industrial accident. He urged the Appeal to be allowed.

I have read the pleadings, proceedings and the judgment of the lower court. I have also considered the submissions made by Counsel for the Appellant and Counsel for the Respondent. This is a first Appeal. The High Court is mandated to determine this Appeal by way of retrial. The High Court is not bound to follow the trial Court's findings of fact if it appears either that the Court failed to take account of particulars circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally. (**See Selle –versus- Associated Motor Boat Company Ltd. [1968] E.A. 123)**. The Appellate Court has to put in mind that it did not have the opportunity of seeing the witnesses as they testified and therefore is not expected to make any finding as to the demeanour of the witnesses. Several issues have been raised for determination by this Court. I will first deal with the procedural issues raised by theRespondent. Mr Musangi, learned counsel for the Respondent has submitted that the leave which was granted by this Court for the Appellant to file the Appeal out of time was irregularly granted. The Respondent was of the view that the Appellant should not have been granted leave to file Appeal out of time as the reasons given for the grant of the said leave were not cogent. This may well be so. Unfortunately this is not the right forum for the Respondent to raise it. If the Respondent was aggrieved by the grant of leave to the Appellant to file an appeal out of time, the Respondent was at liberty to file an Appeal against the said decision. To raise the issue during the hearing of the Appeal is rather late in the day and is with due respect misplaced.

The Respondent has further submitted that the Appeal filed by the Appellant is incompetent for non-compliance with the provisions of **Order XLI Rule 1(A) of the Civil Procedure Rules.** The Respondent has submitted that the Appellant did not include a decree of the lower court in the record of appeal. In the Respondent's view, this rendered the Appeal fatally defective. What does **Order XLI Rule 1 (A**) provide? **Order XLI Rule 1 A** states;

"Where no certified copy of the decree or order appealed against

is filed with the Memorandum of Appeal, the Appellant, shall file

such certified copy as soon as possible and in any event within such

time as the Court may order, and the Court need not consider whether

to reject the Appeal summarily under Section 79B of the Act until such

certified copy is filed."

"Before an Appeal from the subordinate court to the High Court

is heard, a judge of the High Court shall peruse it, and if he

considers that there is no sufficient ground for interfering with

the decree, part of the decree or order appealed against he may,

notwithstanding Section 79C, reject the Appeal summarily."

From the above Sections, it can be argued that the purposes of a decree being filed when an Appeal has been filed is to enable the Court admit the Appeal for hearing or to summarily reject it. The Court may also admit or reject part of the Appeal.

The filing of a decree by an Appellant is a condition precedent before an appeal can be admitted for hearing. Where the Appeal is admitted to hearing and the same is listed for hearing, the Respondent cannot at that stage of the proceedings raise the absence of a decree in the record of Appeal to have the appeal disallowed. Although it is mandatory for the decree to be filed before the Appeal is placed before a judge for admission or rejection, once the Appeal has been admitted, the issue of lack of a decree in the record of appeal becomes superfluous. The competency or otherwise of the Appeal cannot be predicated upon the absence of a decree. In any evident by the time the Appeal is heard the Lower Court file and the record of Appeal would have been prepared and become part of the record of the Appeal. Forthe said reasons, the objection raised by the Respondent to this appeal lacks merit and is rejected.

I now proceed to address the substantive issues raised on this appeal, namely whether or not the Appellant is entitled to judgment being entered in his favour for the injuries which he sustained allegedly on account of the Respondent's negligence. From the outset, I would state that the Appellants suit in his Plaint was based on negligence and breach of duty of care. The Appellant in his Plaint stated in paragraph 4 of his Plaint that the Respondent breach the duty of care to him by exposing him to work in an environment which was unsafe. In this respect the provisions of the **Factories Act (Cap 514)** and the rules made thereunder would be applicable.

Liability in respect of breach of statutory duty is strict. However this does not absolve an employee who obviously engages in a dangerous conduct contrary to specific instructions of the employer from blame in the event of an accident occurring where he gets injured. Strict liability on the part of an employer is not a licence for the employee to engage in acts which a reasonable person may not engage in and which ultimately may appear to all and sundry as utter carelessness. The Appellant also filed his claim based on common law negligence. The Appellant particularised the grounds which he alleges the Respondent to have been negligent. The evidence which was adduced by theAppellant was that he was injured and got his finger cut when he was removing waste with his bare hands from a machine whose parts were then in motion. The Respondent adduced evidence to the effect that the Appellant had been trained and knew that he ought to stop the machine first before he could remove the waste. Further the Appellant was aware that he was under strict instructions not to use his bare hands to remove the waste. For the said purpose, metal hooks were provided.

The trial court visited the factory belonging to the Respondent and was able to observe the way the machine was operated. The learned trial magistrate made the following observations at page 6 of the proceedings:-

> ***"waste can be removed from a particular profesion (sic) (portion ?)***
>
> ***of the machine if it becomes too much that is by switching off only***
>
> ***this particular portion operating a lever just above the metal rod one***
>
> ***does not have to switch the whole system. There are warning notices to***
>
> ***the effect that the machine motion (sic) once should only be done when***
>
> ***the machine is off. A further notice to the effect that waste should not be***
>
> ***scattered on the floor and that machines should be operated with a minimum***
>
> ***of waste as possible. Each machine operator is provided with the metal plea***
>
> ***(sic) (pole?) for removing waste. Just by observing the machine in motion,***
>
> ***it is apparent that it is dangerous and should be handled with care."***

From the above observations it is evident that the Appellant knew that he was operating an inherently

dangerous machine. The Respondent had also taken all the necessary precautions to warn its employers, including the Appellant, on how the said machine was to be operated. Further, the Appellant was warned not to use or expose his bare hands to the moving parts of the machine. When the Appellant was required to remove the waste, he was required to stop the particular portion of the machine and remove the waste from the machine using metal hooks. The evidence of the Appellant clearly indicates that the Appellant did not follow the instructions of the Respondent. Contrary to the Respondent's instructions the Appellant went ahead and sought to remove the waste from the machine when it was in motion with his bare hands. He was injured.

The finding of the trial magistrate that the Appellant was the author of his own misfortune therefore is not misplaced and has foundation. The Appellant embarked on a course of action which he knew or ought to have known would cause injury to him. The decision of the Appellant to embark on the said course of action can only be described as an action of a volunteer who risks his health by undertaking an inherently dangerous activity. The Appellant did not care that he would be injured. Where such a person is injured he cannot blame anyone. In the instant Appeal, the Respondent was able to prove on a balance of probabilitiesthat the Appellant in fact engaged in an activity which he had been specifically warned against. He cannot therefore turn around and blame the Respondent. I am aware of the decision of **Mghosi –versus- Gayatri Engineers Works [1981] K.L.R. 163** where a Court of concurrent jurisdiction as this one held that it was not enough for an employer to provide safe working systems or appliances, he required also ensure that the system is followed and the proper appliances used. In the instant Appeal, the Appellant was not only trained, but was warned by notices posted near his place of work of the do's and don'ts of operating the said machine. He chose to ignore the said warnings to his peril. He was consequently injured.

From the aforegoing, it is evident that the Appellant's Kshs 16,474,053/85 with costs to the Respondent. Should this Court be found to be wrong on Appeal and its decision overturned the quantum of general damages payable to the Appellant is hereby assessed at Kshs. 120,000/=. Those are the orders of the Court.

DATED at NAKURU this 20th day of September, 2004.

L. KIMARU

AG. JUDGE